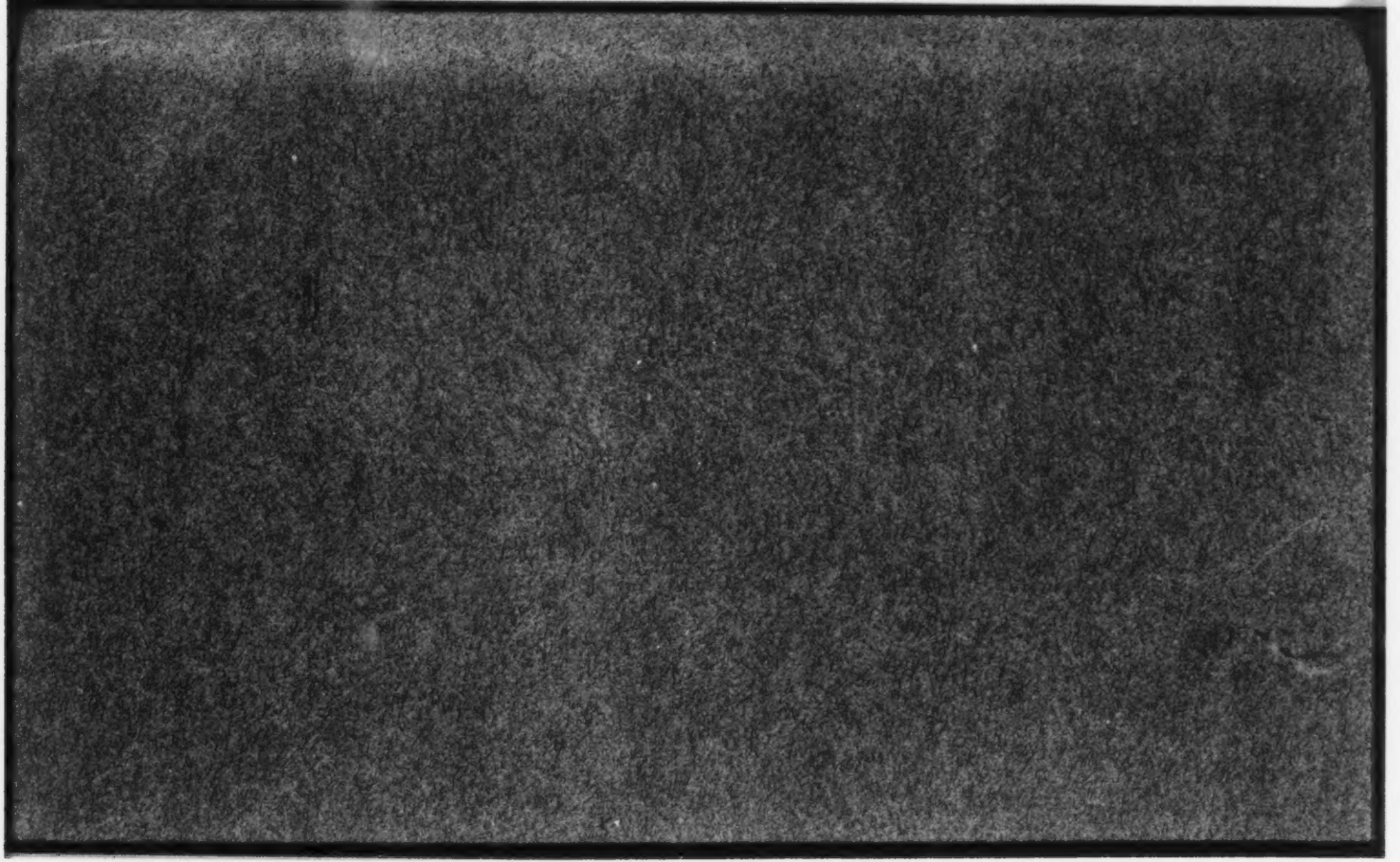

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 760

ALBERT K. MILLER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 14–19) is reported in 40 B. T. A. 515. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 38–40) is reported in 115 F. (2d) 479.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1940 (R. 41). The petition for a writ of certiorari was filed February

12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner sustained a net loss in 1932, which, under Section 117 of the Revenue Act of 1932, could be brought forward as deduction for the following year. Did Section 218 (a) of the National Industrial Recovery Act effectively repeal Section 117 of the Revenue Act of 1932 so that petitioner's 1932 net loss may not be deducted in 1933?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 8–9.

STATEMENT

The facts were found by the Board of Tax Appeals (R. 14–16) pursuant to stipulation of the parties (R. 12–14), and those presently material may be summarized as follows:

The petitioner is a resident of San Francisco, California, and filed his income tax return for the year 1933 with the Collector at that city. During the calendar years 1932 and 1933, petitioner was engaged in business as a trader in securities listed on various stock exchanges in the United States. During the calendar year 1932 petitioner sustained a net loss in the amount of $63,426.02, attributable to the operation of his business, which he attempted to bring forward as a deduction from gross

income in his income tax return for the year 1933 under Section 117 of the Revenue Act of 1932. (R. 15.)

The Commissioner determined a deficiency, disallowing the deduction in the amount of $63,226.02,[1] on the ground that Section 117 of the 1932 Act had been specifically repealed by Section 218 (a) of the National Industrial Recovery Act effective as of January 1, 1933.

The Board of Tax Appeals approved the Commissioner's position (R. 14–19), and the Circuit Court of Appeals affirmed (R. 38–40).

ARGUMENT

Under Section 117 of the Revenue Act of 1932 petitioner would have been able to deduct his 1932 net loss in his 1933 returns. However, Section 218 (a) of the National Industrial Recovery Act, enacted June 16, 1933, specifically repealed Section 117 of the Revenue Act of 1932, "Effective as of January 1, 1933". See Appendix, *infra,* p. 9. Accordingly, the right to carry over the net loss was eliminated as of January 1, 1933, and petitioner's 1932 net loss was therefore not deductible in 1933.

In claiming that the right to the deduction continued notwithstanding the provisions of the 1933

[1] The failure of the Commissioner to disallow the full $63,426.02 was probably due to an error, and in the Board the Commissioner sought an increased deficiency based upon disallowance of the entire amount. (R. 15.)

repeal, petitioner makes many sweeping contentions which, we submit, are without substance.

1. Petitioner's primary contention (Pet. 8) that the decision below is in "square and direct conflict" with *Schecter Corp.* v. *United States,* 295 U. S. 495 and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, is utterly fatuous.

Those decisions simply held invalid the provisions of Title I of the National Industrial Recovery Act which dealt with codes of fair competition and oil regulation. They had no bearing at all upon the numerous unrelated provisions of Titles II and III of the Act which dealt with fiscal matters and attacked problems of industrial recovery in a manner entirely different from that which characterized Title I. Cf. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 473–474.

Section 218 (a), here involved, is found in Title II of the Act. It is but one of a number of provisions in that title by which Congress undertook to increase the revenues. Thus, Section 211 increased the excise tax imposed on the sale of gasoline; Section 212 extended certain excise taxes imposed under the Revenue Act of 1932; Section 213 imposed an excise tax on corporate dividends; Sections 215 and 216 imposed related capital stock and excess profits taxes; and Sections 217, 218 and 219 contained various amendments and provisions all of which related to taxes.

These provisions had no connection with the regulatory features of Title I, and if they relate to

anything in the Act, they were intended simply to furnish additional revenue so that the large program of public works provided for in Title II might be more readily financed.[2]

Moreover, if any doubt should exist, it would be dispelled by the separability clause in Section 303 of the National Industrial Recovery Act, see Appendix, *infra*, p. 9. Cf. *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 434; *Sonzinsky* v. *United States*, 300 U. S. 506.

2. Petitioner further challenges Section 218 (a) on the ground that it is retroactive and therefore violates the Fifth Amendment. It is true that the National Industrial Recovery Act was enacted June 16, 1933, and that Section 218 (a) repealed Section 117 of the Revenue Act of 1932 as of January 1, 1933. But any argument that this limited retroactivity constitutes a violation of the Fifth Amendment is foreclosed by a long line of decisions of this Court.

The income tax titles of all of the revenue acts have been retroactive in the sense that they have prescribed rules for the determination of income and deductions and the collection of taxes with respect to transactions for a period prior to passage

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[2] For other cases applying the various tax provisions of Title II, see *Allied Agents* v. *United States*, 26 F. Supp. 98 (C. Cls.); *W. & K. Holding Corp.* v. *Commissioner*, 38 B. T. A. 830; *A. J. Crowhurst & Sons, Inc.* v. *Commissioner*, 38 B. T. A. 1072; *Cereal Products Refining Corp.* v. *Commissioner*, 39 B. T. A. 92.

of the Acts. And such retroactivity has been uniformly upheld as being consistent with the due process clause of the Fifth Amendment. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Cooper* v. *United States*, 280 U. S. 409, 411–412; *Taft* v. *Bowers*, 278 U. S. 470; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *Brown & Sons Co.* v. *Burnet*, 282 U. S. 283; *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Phillips* v. *Commissioner*, 283 U. S. 589; *Reinecke* v. *Smith*, 289 U. S. 172; *Burnet* v. *Wells*, 289 U. S. 670; *United States* v. *Hudson*, 299 U. S. 498, 500.

Moreover, petitioner is here claiming the right to a deduction, which in any event is a matter of "legislative grace." *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440; *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371. And where Congress has merely revoked a privilege it had given previously, the principles announced in the foregoing cases, are *a fortiori* applicable.

3. Likewise, petitioner's contention that Section 218 (a) is not applicable to the calendar year 1933 is equally without substance. The legislative history of the provision cited by petitioner (Pet. 22) clearly shows that Congress was effectively removing a privilege granted by a prior statute. The term "subsequent year" refers to the year succeeding that in which the loss actually occurred and in which the deduction was allowable, if not repealed. The language does not refer to the year subsequent to the enactment of the Act and only through a

strained construction can such a result be reached. The deduction which petitioner seeks for the year 1933 is founded upon Section 117 of the Revenue Act of 1932. But that provision was unambiguously repealed as of January 1, 1933, and there is no room for any such tortured interpretation of the statute as petitioner suggests.

CONCLUSION

There is no real conflict with other decisions, such as asserted by petitioner. The decision below is in accord with settled principles. The petition should be denied.

Respectfully submitted.

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MARCH 1941.